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MICHAEL RODAK, JR., C

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 72-1094

October Term, 1972

DR. GEORGE J. BETO, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

v.

GUADALUPE O. SANCHEZ,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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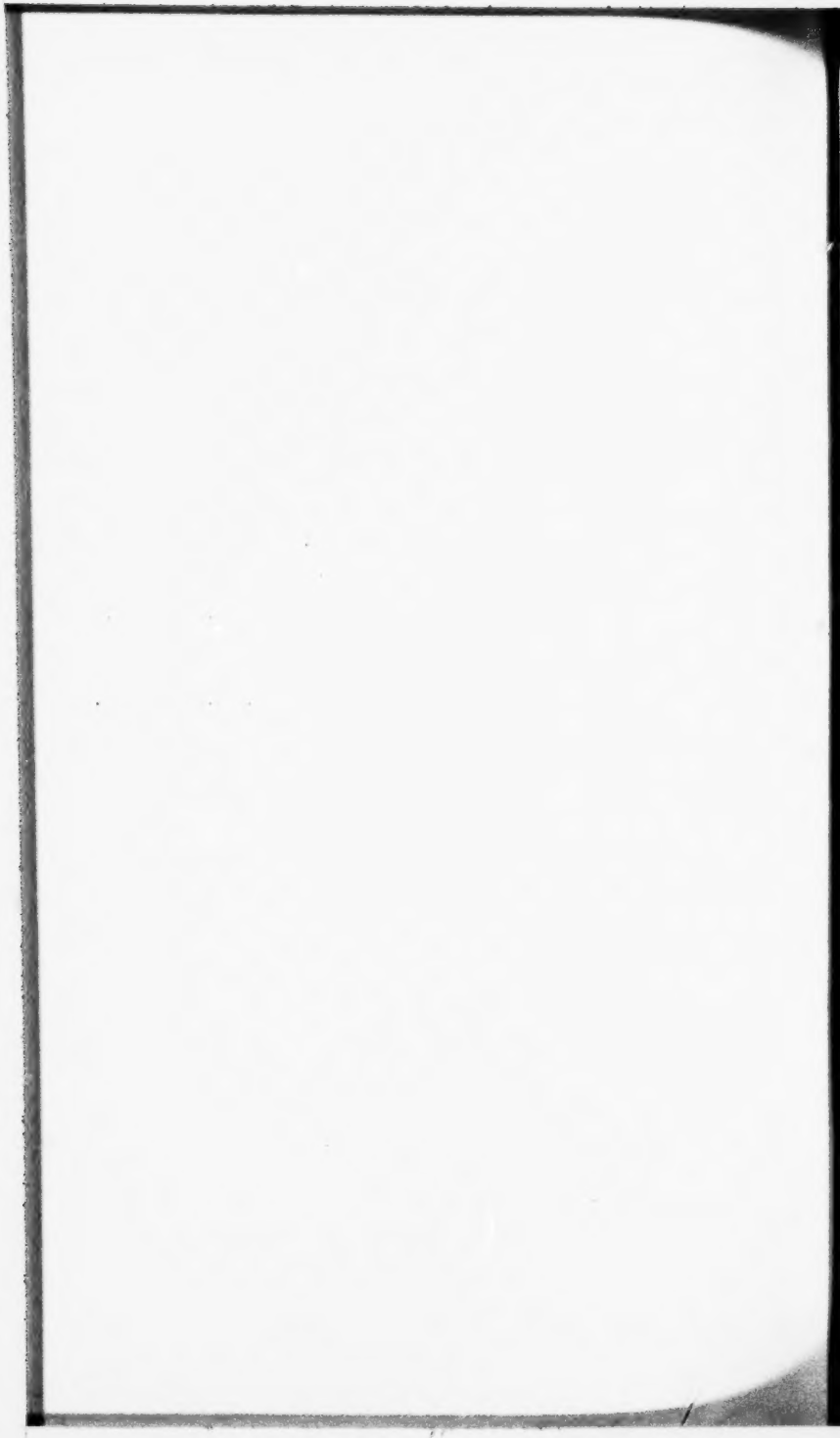
RESPONSE NOT PRINTED



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GUADALUPE O. SANCHEZ,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Dr. George J. Beto, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on October 2, 1972.

OPINION BELOW

The opinion delivered in the court below is reported at 467 F.2d 513 (1972) and is appended to this Petition as Appendix "A". A copy of the opinion of the United States District Court for the Southern District of Texas is appended hereto as Appendix "B". A Stay of Mandate was granted by the United States Court of Appeals to and including February 14, 1973.

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JURISDICTION

As indicated above, the opinion of the United States Court of Appeals was entered on October 2, 1972. (See Appendix "A".) A copy of the judgment is attached hereto as Appendix "C". The State of Texas thereafter, on October 13, 1972, filed a Petition for Rehearing with the suggestion that such petition be heard en banc, and said petition was denied November 16, 1972. (See Appendix "D".)

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Fifth Circuit in granting habeas relief has misconstrued *Miranda* v. *Arizona*, 384 U.S. 436 (1966), when such court's construction is in conflict with the construction placed upon *Miranda* by the Second, Eighth, and Ninth Circuits?

2. Whether the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. Section 3501, which provides that whether or not a defendant has been given a *Miranda* type warning is only one indicium of "in determining the issue of voluntariness" is applicable to statements introduced into evidence at state court trials?

3. Whether the new rule of retroactivity announced in *Williams* v. *United States*, 401 U.S. 646 (1971), which provides that a new decision should apply only to searches which occurred after the date of the decision should be additionally applied in confession cases so that the rule in *Miranda* would apply only to confessions taken after the date of the decision in *Miranda*?

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CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides:

> ". . . nor shall [no person] be compelled in any criminal case to be a witness against himself."

The Sixth Amendment provides:

> ". . . and to have the Assistance of Counsel for his defense."

The Fourteenth Amendment provides:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

Sanchez was convicted in the 105th Judicial District Court of Nueces County, Texas, for the offense of murder with malice. Sanchez plead not guilty, was found to be guilty, and was assessed death by the jury as punishment. The said judgment and sentence was appealed to the Court of Criminal Appeals of Texas, and said judgment of conviction was affirmed in an opinion delivered March 11, 1970, styled *Sanchez* v. *State*, 454 S.W.2d 210 (Tex.Crim. 1970). The sentence of death was subsequently commuted to life imprisonment. Sanchez in his state court appeal, raised substantially the same issues that were raised in his applications for writ of habeas corpus in the United States District Court below, and in the United States Court of Appeals for the Fifth Circuit.

Sanchez filed his application for writ of habeas corpus in the United States District Court for the Southern District of Texas, and on April 14, 1971, the District Court denied him relief. Sanchez appealed this decision to the United States Court of Appeals, and on

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October 2, 1972, the Fifth Circuit reversed the holding of the United States District Court ruling that Sanchez had not been sufficiently warned that he was entitled to the "presence" of an attorney at the time of his interrogation.

REASONS FOR GRANTING THE WRIT

1. The Fifth Circuit In Granting Habeas Relief Has Misconstrued Miranda v. Arizona, 384 U.S. 436 (1966), And The Construction Is In Conflict With The Construction Placed Upon Miranda By The Second, Eighth, And Ninth Circuits.

In granting Sanchez relief, the Fifth Circuit held that Sanchez was not informed that he was entitled to the presence at his interrogation of an attorney, retained or appointed. The record of Sanchez's state court trial clearly reflects that he was sufficiently apprised that he had the right to the presence of an attorney during interrogation so as to satisfy the requirements this Court laid down in *Miranda*, supra.

Sanchez was arrested and booked into the Corpus Christi, Texas, police station at 10:11 P.M. on May 3, 1966. (S/F 200). At 10:30, Sanchez was warned at the police station by Justice of the Peace, Armando Flores, ". . . of his right to an examining trial; of his right to bail, if any; of his right to the advice of a lawyer, and if he were unable to hire a lawyer of his right to request appointment of counsel; that he did not have to make any statement at all and that any statement he makes may be used against him in any court of law." (S/F 816, 312, 313). The Justice of the Peace also testified that he warned Sanchez in Spanish and in English. (S/F 313, 510).

One of the arresting officers also testified that Sanchez was asked at that time if "he wanted an attor-

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ney, . . . if he wanted to call anyone, if he wanted to see anyone . . ." (S/F 251-253). The arresting officer also testified that he asked Sanchez "if he wanted to call anyone or if he wanted a lawyer." (S/F 274).

At 8:37 A.M. the next morning, Sanchez was taken before Justice of the Peace Peter Dunne, where he was again warned of his rights. Sanchez was given the same warning he had been given the night before by Judge Flores. (S/F 817). Judge Dunne testified he gave these warnings twice (S/F 522), and Judge Dunne further testified that he told Sanchez that *he had a right to have an attorney, and that he would appoint a lawyer for him.* (S/F 524).

Sanchez was next taken to the Department of Public Safety where he gave his statement. Sanchez arrived at the Department of Public Safety about 9:15 in the morning, and was taken to the polygraph operator, Henry Canty. Mr. Canty testified he gave Sanchez the warnings printed on the statement, S/F 821, and that he told Sanchez that he did not have to make any statement, that he had a right to remain silent, that he had the right to an attorney. (S/F 346). Mr. Canty testified (S/F 348) that:

> "I examined him and asked him if he understood that he had a right to discuss this with an attorney or anybody that he wanted to, as far as that goes, and he said he understood that, and he said he didn't need an attorney."

Mr. Canty also testified (S/F 537) that before the statement was taken he gave Sanchez the following warning:

> "A I told him that he did not have to talk to me if he didn't want to talk to me; if he wanted to talk to me, all right, and if he wanted to talk to anybody else that was all right too; if

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> he wanted to stop talking at any time, that was all right, too, it was up to him, whenever he wanted to stop, or if he wanted to continue, it would be fine. I also advised him that he had a right to an attorney, I asked him if he understood that and he said he did. I asked him if he wanted one, and he said he didn't need one."

The Fifth Circuit held that these warnings were insufficient to apprise Sanchez that he was entitled to an appointed or retained attorney here and now. Petitioner contends that this holding construes *Miranda* much too strictly. The construction placed upon *Miranda* by the Second, Eighth, and Ninth Circuits is that

> "The words of Miranda do not constitute a ritualistic formula which must be repeated without variation in order to be effective. Words which convey the substance of the warning along with the required information are sufficient." United States v. Vanterpool, 394 F.2d 697, 698-99 (2nd Cir., 1968). See also Swinney v. United States, 408 F.2d 121 (9th Cir. 1969); Tucker v. United States, 375 F.2d 363 (8th Cir. 1967).

In *Evans* v. *Swenson*, 455 F.2d 291 (8th Cir. 1972) the court held

> "Words which convey the substance of the warning along with the required information are sufficient."

In *United States* v. *Lamia*, 429 F.2d 373 (2nd Cir. 1970), cert. den. 400 U.S. 907, the defendant was told that he had the "right to an attorney" and if he was not able to afford an attorney one would be appointed by the court. Defendant argued that this warning did not apprise him that he had the right to the "presence" of an attorney during questioning. The Second Circuit rejected defendant's claim holding that he had been

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told "without qualification that he had the right to an attorney, and that one would be appointed if he could not afford one." To the same effect is *United States* v. *Cusumano*, 429 F.2d 378 (2nd Cir. 1970), cert.den. 400 U.S. 830, where the court stated at page 380,

> "Neither Cusumano nor Testa was specifically told that he had a right to have an attorney present during actual questioning, yet such an inferance can readily be drawn from the circumstances of the warning."

Petitioner strongly urges that the construction placed upon *Miranda* by the Second, Eighth, and Ninth Circuits, is the more reasonable one, and that this Court should grant certiorari in this case to settle this conflict between the circuits.

2. Since Sanchez's Statement Was Found To Be Freely And Voluntarily Made In A Hearing Outside The Presence Of The Jury, And Since The Statement Would Be Admissible In A Federal Trial Under The Omnibus Crime Control And Safe Streets Act, This Court Should Determine The Applicability Of The Act To State Trials.

The Omnibus Crime Control and Safe Streets Act, 18 U.S.C. Section 3501 provides that a confession, if voluntarily given, shall be admissible into evidence. The Act provides that before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to the voluntariness. If the trial judge determines that the confession was voluntarily made, the confession shall be admitted into evidence and the jury is then permitted to hear relevant evidence on the issue of voluntariness, and can give the confession such weight as the jury feels it deserves.

The statute provides that the judge in determining

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voluntariness shall take into consideration five factors, one of which is *whether or not the defendant had been advised prior to questioning of his right to the assistance of counsel.* The Act then goes on to state that the presence or absence of any of the above mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession. It is observed that the state trial judge held a hearing outside the presence of the jury on the voluntariness of Sanchez's statements, and after hearing all the evidence ruled that the statements were voluntarily made and were admissible. (Transcript 81).

The Fifth Circuit overturned Sanchez's conviction solely because it felt that he was not properly apprised of his right to the assistance of counsel prior to or during questioning. There is no doubt but that the confession was freely and voluntarily made in every other respect. Therefore, if the Omnibus Crime Control Act were controlling, Sanchez's statement would clearly be admissible into evidence as the *Miranda* type warning is only one indicium of "in determining the issue of voluntariness". Here, the statement or confession of Sanchez was made on May 4, 1966, and *Miranda* was decided on June 13, 1966. It would be unconscionable for Sanchez's statement to be admissible in a federal court but be constitutionally impermissible in a state trial. To rule otherwise would constitute a mockery of justice and would impose an impossible strain on federal state relations.

3. Since Sanchez Was Properly Warned Under The Law As It Existed At The Time The Statement Was Made, The Propriety Of The Warning Should Be Measured By The Standards In Effect At That Time, And Not By The Miranda Rule

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Expounded Some Five Weeks After The Confession.

Even though *Johnson* v. *New Jersey*, 384 U.S. 719 (1966), states that the *Miranda* warnings apply to all cases tried after *Miranda*, such a holding is illogical and does not represent a sound approach to the retroactivity problem.

The first retroactivity rule provided that a newly defined constitutional right applied to all cases where the conviction was not final—where the cases were still on direct appeal. *Linkletter* v. *Walker*, 381 U.S. 618 (1965); *Tehan* v. *Shott*, 382 U.S. 406 (1966).

Then this Court provided that, where non-retroactivity was appropriate, a new interpretation of the law would apply only to cases where the *trial* is begun after the decision. *Stovall* v. *Denno*, 388 U.S. 293 (1967); *Johnson* v. *New Jersey*, 384 U.S. 719 (1966).

Now, this Court has altered the retroactivity rule so that its new interpretative decisions (which do not affect the integral truth-determining process of a trial) apply only to particular acts or activities in question in the decisions that occur after the holding. This new retroactivity rule is best defined in *Williams* v. *United States*, 401 U.S. 646, (1971), wherein this Court held that the limited search rule announced by *Chimel* v. *California*, 955 U.S. 752 (1969), applied only to searches made after the decision in *Chimel*. See also *United States* v. *White*, 401 U.S. 745, (1971), limiting *Katz* v. *United States*, 389 U.S. 347, to eavesdropping occurring after the date of the *Katz* holding; and *Desist* v. *United States*, 394 U.S. 244 (1969), also applying *Katz* prospectively to eavesdropping after the date of *Katz*.

Applying this rationale to the case at bar, the vol-

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untariness of Sanchez's statement should be judged by the law prevailing at the time the statement was taken. Sanchez was given the proper and correct warnings in effect at the time the statement was taken. It is grossly unfair to set aside Sanchez's conviction by holding his statement inadmissible when the statement was secured in conformity with the then applicable constitutional law as prescribed by this Court.

Since there is no doubt but that Sanchez was properly warned under the existing law at the time the statement was taken, and since the statement was held voluntary after a *Jackson* v. *Denno*, type hearing, the admissibility of the statement raises no serious question about the accuracy of the guilty verdict in Sanchez's trial. The good faith reliance by state law enforcement personnel on the then existing valid law and accepted practice should not be rendered futile by holding Sanchez's statement inadmissible because of the Fifth Circuit's view that Sanchez was not properly informed that he was entitled to the presence of an attorney at his interrogation.

CONCLUSION

For the above and foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Dunklin Sullivan, a member of the Bar of the Supreme Court of the United States, do hereby certify that three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been served on counsel for the Respondent by depositing same in the United States Mail, postage prepaid, addressed to: Mr. Gary Norton, Attorney at Law, 200 Hawn Building, Corpus Christi, Texas 78401, on this the.....day of February, 1973.

DUNKLIN SULLIVAN
Assistant Attorney General

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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 71-2059

GUADALUPE O. SANCHEZ,
Petitioner-Appellant,

v.

DR. GEORGE J. BETO, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
TEXAS,
Respondent-Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS

(October 2, 1972)

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

GODBOLD, Circuit Judge: The appellant Guadalupe O. Sanchez was convicted of murder with malice in Texas state court and sentenced to death. The Texas Court of Criminal Appeals affirmed.[1] Having ex-

[1]Sanchez v. State, 454 S.W.2d 210 (Tex. Cr. App. 1970).

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hausted his state remedies, he filed in the United States District Court a petition for writ of habeas corpus which, after hearing, was denied. The only point which we need discuss is the failure to give the warnings mandated by *Miranda* v. *Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694 (1966). That failure requires us to reverse the denial of the writ.

The interrogation was custodial. Even though the confession was made May 4, 1966, five weeks before the date *Miranda* was decided, which was June 13, 1966, the decision applies because Sanchez's trial commenced April 10, 1967, well after the date of the decision. *Johnson* v. *New Jersey*, 384 U.S. 719, 16 L.Ed. 2d 882 (1966).

Sanchez was 18 years old when arrested. According to the merits trial testimony of the only expert who had examined and tested him, he was mentally retarded, had an I.Q. of 73 and an intelligence level in the lower 5% of the population, and the ability to understand and reason of a child 12 to 13.[2]

Between about 10:30 p.m. on May 3, 1966, and the early afternoon of May 4, Sanchez was warned over and over again—by a justice of the peace, a police officer, then another justice of the peace, followed by a warning from a polygraph operator given before the polygraph examination commenced.[3] Sanchez confessed to the polygraph operator.

The form of the numerous warnings is understandable since, in each instance (except the brief and in-

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[2]Other testimony by an expert who briefly observed Sanchez but did not test him placed him slightly higher. His jailer said he was of average intelligence.

[3]One or more warnings were given during the polygraph examination, but whether these were before of after incriminating statements were elicited is unclear.

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formal warning by the police officer) they followed exactly or with minor variation the provisions of Art. 15.17, Tex. C.C.P. as then in force:

Art. 15.17 Duties of arresting officer and magistrate

> In each case enumerated in this Code, the person making the arrest shall immediately take the person arrested before some magistrate of the county where the accused was arrested. The magistrate shall inform the person arrested of the accusation against him and of any affidavit filed therewith, of his right to retain counsel, of his right to request the appointment of counsel if he is unable to obtain counsel, and of his right to have an examining trial. He shall also inform the person arrested that he is not required to make a statement and that any statement made by him may be used against him. The magistrate shall allow the person arrested reasonable time and opportunity to consult counsel and shall admit the person arrested to bail if allowed by law.

That section had been acted in response to *Escobedo* v. *Illinois*, 378 U.S. 478, 12 L.Ed. 2d 977 (1964).[4] Article 15.17 did not meet the requirement that the individual subjected to interrogation must be warned that he has the right to the presence at the interrogation of an attorney, retained or appointed. In none of the warnings was Sanchez informed of this right. On August 28, 1967, Art. 15.17 was amended so as to add this requirement: "[The magistrate shall inform in clear language the person arrested] . . . of his right to have an attorney present during any interview with peace officers or attorneys representing the state. . . ."[5]

---

[4]Charles v. State, 424 S.W.2d 909, 920 (Tex. Cr. App. 1967), *cert. denied*, 392 U.S. 940, 20 L.Ed. 2d 1401 (1968).

[5]The entire text of amended Art. 15.17 is:

Art. 15.17 Duties of arresting officer and magistrate

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The requirement critical in this case begins with *Miranda* itself, which styled as an "absolute prerequisite to interrogation" that "an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation." 384 U.S. at 471, 16 L.Ed. 2d at 722.

The Texas bar recognized in 1966, after *Miranda* came down, that Art. 15.17 as then in effect did not meet the newly articulated constitutional standards.

> It [the Special Committee of the State Bar of Texas for the Revision of the Code of Criminal Procedure] recommends that Article 15.17 be amended so as to set forth more specifically the "warning" that a magistrate must give the accused brought before him, in order to conform to the requirements of the United States Supreme Court, decision in the *Miranda* case.

Morrison & Bowner, Recommended Changes Code of Criminal Procedure, 29 Tex. Bar J. 1003, 1055 (1966). The Texas legislature responded in 1967 with amended Art. 15.17. See Judge Onion dissenting in *Charles* v.

In each case enumerated in this Code, the person making the arrest shall without unnecessary delay take the person arrested or have him taken before some magistrate of the county where the accused was arrested. The magistrate shall inform in clear language the person arrested of the accusation against him and of any affidavit filed therewith, of his right to retain counsel, of his right to remain silent, of his right to have an attorney present during any interview with peace officers or attorneys representing the state, of his right to terminate the interview at any time, of his right to request the appointment of counsel if he is indigent and cannot afford counsel, and of his right to have an examining trial. He shall also inform the person arrested that he is not required to make a statement and that any statement made by him may be used against him. The magistrate shall allow the person arrested reasonable time and opportunity to consult counsel and shall admit the person arrested to bail if allowed by law.

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State, 424 S.W.2d 909, 922 (1967), *cert. denied*, 392 U.S. 940, 20 L.Ed. 2d 1401 (1968):

> How [former Art. 15.17], in effect at the time of the appellant's statement, afford[s] even greater procedural safeguards than any United States Supreme Court decision construing the due process clauses of the Federal Constitution as claimed by the majority is beyond the comprehension of this writer.
>
> What the majority still fails to grasp, the Legislature was quick to realize. The Legislature recognized that the statutes in effect at the time of appellant's statement, enlightened as they may have been when enacted, did not meet the requirements of the *Miranda* decision, nor were as fully effective.

This circuit has carefully followed the *Miranda* command. *Fendley* v. *U.S.*, 384 F.2d 923 (5th Cir. 1967); *Windsor* v. *U.S.*, 389 F.2d 530 (5th Cir. 1968); *Chambers v. U.S.*, 391 F.2d 455 (5th Cir. 1968); *Montoya* v. *U.S.*, 392 F.2d 731 (5th Cir. 1968); *Lathers* v. *U.S.*, 396 F.2d 524 (5th Cir. 1968); *Atwell* v. *U.S.*, 398 F.2d 507 (5th Cir. 1968). We have examined with a microscopic eye the many cautionary statements made to Sanchez. None reaches the standard which *Miranda* and our own unbroken line of decisions require.

> The *Miranda* warning must effectively convey to the accused that he is entitled to a government-furnished counsel *here and now*. If the words are subject to the construction that such counsel will be available *only in the future*, *Miranda* has not been obeyed. Although there is no talismanic or heraldic abracadabra which must be fulfilled, the offer of counsel must be clarion and firm, not one of mere impressionism.

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Lathers v. *U.S.*, *supra*, at 535 (emphasis supplied).

> [In *Windsor*] as here appellant was advised of his right to speak to or consult with an attorney, but was not advised that "he was entitled to the *presence* of an attorney, retained or appointed, during the interrogations." We held in *Windsor* that this did not meet the *Miranda* criteria for admissibility. Similarly, lack of compliance with the standards of *Miranda* is apparent here.

Chambers v. *U.S.*, *supra*, at 456 (emphasis original).

The state relies upon cases from the Second Circuit which have held the requirements of *Miranda* satisfied under circumstances in which, although there is no evidence that the accused was told of his right to the presence of an attorney, an inference can be drawn to that effect. *U.S.* v. *Cusumano*, 429 F.2d 378 (2d Cir.), *cert. denied*, 400 U.S. 830, 27 L.Ed. 2d 61 (1970); *U.S.* v. *Lamia*, 429 F.2d 373 (2d Cir.), *cert. denied*, 400 U.S. 907, 27 L.Ed. 2d 146 (1970). That approach was considered and rejected in *Lathers*, see quote above, and *Montoya*, *supra*, at 735. The state also suggests that *Windsor* may be distinguished on the ground that the interrogator there affirmatively misled the accused by the use of the word "before," i.e., that the accused was told that he had the right to consult an attorney *before* he said anything. Our subsequent cases have not taken so narrow a view of *Windsor*. Neither *Chambers*, *Lathers* nor *Atwell* relies upon the "affirmative misleading" argument.

The judgment of the District Court is REVERSED and the cause is REMANDED with directions to grant the writ discharging petitioner from custody unless the state elects, within a reasonable time to be set by the District Court, to retry him on the indictment.

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APPENDIX B

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

C. A. NO. 70-C-221

GUADALUPE O. SANCHEZ

v.

DR. GEORGE J. BETO, DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS

MEMORANDUM AND ORDER

Petitioner filed his application for writ of habeas corpus in this Court on the 10th day of November, 1970. He had been tried in the State District Court in Nueces County, Texas, convicted of murder with malice, and his punishment assessed at death by a jury in April of 1967. The execution of death of petitioner by electrocution scheduled for November 20, 1970, was stayed by this Court, pending final determination of all of the questions raised in such application.

The crime was committed on June 8, 1965, and the petitioner (defendant) was arrested on May 3, 1966. Numerous motions were filed complaining of violations (lack of *Miranda* warning, refusal of right to counsel and the death penalty) of his rights under the Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States of America. Complaints as to the

State Court's action in overruling such motions are included in Points One (1) through Seventeen (17) of the petitioner's application. The Court, after a full hearing and examination of the record in the State Court proceedings, finds that the petitioner had exhausted his state remedies as to these matters and had not been denied any of his constitutional rights with regard to matters called to the attention of the Court by such points.

Prior to the State Court trial, the Court-appointed attorney filed a request to "inspect, copy and photograph any and all records or files" (itemizing the nature of the records and the contents of the files) which the State had in its possession, custody and control, and which related to the petitioner and the crime of which he was accused. This request was denied and later reconsidered and denied a second time. Petitioner offered testimony to preserve his objections to the Court's ruling, and this was rejected. The petitioner, through his Court-appointed counsel, then dictated into the record what he expected to show by such testimony. Petitioner urged his objections to such action of the Court in his original and amended motions for new trial. However, petitioner did not present this point in any habeas corpus proceedings in the State Courts.

This Federal Court is not here required to pass on the effectiveness of the action of petiitoner in protecting and preserving his objections to the trial court's refusal to permit him to examine the State's records and files. The foregoing facts are recited by this Court as the basis for its conclusions as to whether or not the petitioner's State remedies regarding this particular matter need to be exhausted before this Court can consider it.

The petitioner, in points Eighteen (18) through Twenty-four (24), sets out his various contentions why he is entitled to the discovery of the records and files of the State's attorney which relate to him by the inspection, copying and photographing thereof. This Court, at a hearing in open court, admitted, solely for the purpose of examination by the Court in camera, the file of the State's attorney and the file of the Police Department of the City of Corpus Christi, Texas, regarding the petitioner, and then examined the records and files, in camera. The Court found nothing to indicate the existence of favorable evidence to contradict the guilt of petitioner or his punishment. Thus, there had been no suppression of evidence.

However, the State contends in this proceeding (through the Attorney General of Texas) that the Federal Court should not have examined those files, but petitioner's application should have been dismissed because the State remedies of petitioner have not been exhausted. The Court is familiar with *Williams* v. *Dutton*, 400 F.2d 797 (5 Cir., 1968), but does not believe it is controlling in this case.

The petitioner, as we pointed out earlier, unsuccessfully raised the constitutional questions involved in the State trial court's refusal of discovery both at trial and appeal levels. Those questions "need not be relitigated by the State habeas corpus or other post-conviction remedies as a prerequisite to an application for habeas relief to a federal district court." *Hill* v. *Beto*, 390 F.2d 640, 641 (5 Cir., 1968). Following the rule just quoted, the Court is of the opinion it should pass on petitioner's application as to this problem. The Court holds petitioner was not denied any of his constitutional rights by virtue of the State Court's refusal

to permit the examination of the State's records and files.

It is therefore ORDERED that petitioner's application for writ of habeas corpus be, and it is denied.

The application of Guadalupe Sanchez for writ of habeas corpus having been denied, the Plaintiff's Exhibit 6 which was introduced solely for examination by the Court in camera should be returned to the Police Department of the City of Corpus Christi, Texas, and Plaintiff's Exhibit 7 which was introduced solely for the purpose of examination by the Court in camera and which are now in the Court's possession should be returned to the Office of the District Attorney, Nueces County, Texas; and, unless the petitioner shall properly perfect an appeal from this judgment of the Court, the Clerk of the Court is ordered to return said files.

Signed this 14th day of April, 1971.

OWEN COX
United States District Judge

APPENDIX C

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1971

NO. 71-2059

D. C. Docket No. CA 70 C-221

GUADALUPE O. SANCHEZ,
Petitioner-Appellant,

v.

DR. GEORGE J. BETO, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
TEXAS,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Texas

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Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

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ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the said District Court with directions to grant the writ discharging petitioner from custody unless the state elects, within a reasonable time to be set by the District Court, to retry him on the indictment, in accordance with the opinion of this Court;

It is further ordered that respondent-appellee pay the costs on appeal in this Court.

October 2, 1972

Issued as Mandate:

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APPENDIX D

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 71-2059

GUADALUPE O. SANCHEZ,
Petitioner-Appellant,

v.

DR. GEORGE J. BETO, DIRECTOR,
DEPARTMENT OF CORRECTIONS, TEXAS,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC
(Opinion Oct. 2, 1972, 5 Cir., 1972, ... F.2d .....).

(November 16, 1972)

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition of Rehearing En Banc is DENIED.

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